Nos. 77-406 and 77-434

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15)[1] is not yet reported. The opinion and order of the Federal Communications Commission (Pet. App. 16-44) is reported at 56 FCC 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1977. The petition for a writ of certiorari in No.

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[1]"Pet. App." refers to the separately bound joint appendix.

77-406 was filed on September 15, 1977, and the petition in No. 77-434 was filed on September 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly concluded that States may not adopt rules or issue orders that would interfere with the provision of interstate communications services by communications common carriers as part of an integrated interstate communications network.

STATEMENT

This case arises out of the efforts of the Southern Pacific Communications Co., an interstate communications common carrier licensed by the Federal Communications Commission, to extend an existing interstate line from Los Angeles to San Diego.

In 1971 the Commission adopted a general policy favoring the entry of new common carriers into the business of providing specialized interstate communications service, for which the public had previously been dependent mainly on the American Telephone & Telegraph Company ("AT&T"). *Specialized Common Carrier Services,* 29 FCC 2d 870, affirmed on reconsideration, 31 FCC 2d 2206, affirmed *sub nom. Washington Utilities & Transportation Commission* v. *Federal Communications Commission,* 513 F. 2d 1142 (C.A. 9), certiorari denied *sub nom. National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission,* 423 U.S. 836. The Commission also concluded then that the new carriers should be permitted to connect with established carriers on a nondiscriminatory basis, in order to provide the intercity and local distribution facilities needed by the new carriers to complete their service offerings. *Ibid.*

AT&T and its subsidiaries resisted this decision. In 1973 the Commission ordered them to afford to the new interstate carriers all necessary local exchange interconnection facilities. *Bell System Tariff Offerings,* 46 FCC 2d 413, affirmed *sub nom. Bell Telephone Co. of Pennsylvania* v. *Federal Communications Commission,* 503 F. 2d 1250 (C.A. 3), certiorari denied *sub nom. American Telephone & Telegraph Co.* v. *Federal Communications Commission,* 422 U.S. 1026. The Commission held there that AT&T and its local operating companies must file with it, rather than with state regulatory commissions, tariffs to cover the offering of interconnection facilities for the competing specialized carriers. 46 FCC 2d at 437.

Southern Pacific is one of the new specialized interstate carriers licensed by the Commission. Southern Pacific operates a private, national communications network for American Airlines (Pet. App. 21). One line of the network terminated in Los Angeles, and in 1975 Southern Pacific sought to extend this line from Los Angeles to San Diego. In order to provide the same service provided to callers elsewhere on the system, Southern Pacific needed to be able to connect its line with local telephone company distribution facilities. The Pacific Telephone & Telegraph Company ("Pacific"), an AT&T operating company, initially refused to provide the requested connection, claiming that the facilities were intrastate and thus within the jurisdiction of the California Public Utilities Commission rather than federal jurisdiction.[2] Pacific subsequently

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[2]Although Southern Pacific also had state authority for intrastate private line service, the California Commission forbade the connection of Southern Pacific's lines with local exchange facilities necessary to provide foreign exchange service (Pet. App. 45-124). This case does not present any question concerning interconnection with Southern Pacific's intrastate private lines.

provided the requested connection under protest, while asking the California Commission for an order requiring Southern Pacific to desist. Southern Pacific then sought clarification from the Federal Communications Commission, petitioning for a declaratory ruling with respect to the scope of federal jurisdiction.

The Commission found that the physical location of the line was within California, but that it is "an integral part of a dedicated interstate communications network" used by American Airlines (Pet. App. 32). It ruled that the line was part of an interstate communications network, and the fact that some of the communications on the line overwhelmingly used for interstate traffic[3] would both begin and end in California was not enough to allow state authorities to forbid interconnection— a prohibition that would bar the interstate service as well as the intrastate service (*id.* at 30-32). The Commission found that California's policy of barring local interconnection of this line frustrated the federal policy (*id.* at 28-30), and it held that Pacific must provide the requested interconnection (*id.* at 33).

A divided court of appeals affirmed the Commission's order (Pet. App. 1-15). Finding the only "substantial issue" raised on appeal to be "whether the Commission possesses statutory authority to regulate the facilities in question" (Pet. App. 4), the court concluded that the Commission had not exceeded its authority. The court agreed with the Commission's determination that it could regulate facilities used in both interstate and intrastate

[3]It is undisputed that 82 percent of the calls over the line would be interstate (Pet. App. 21).

communications when it is "technically and practically difficult" to separate the two types of communications (Pet. App. 4-5).[4]

The court held that the Commission reasonably had concluded that it was impractical to attempt to separate the interstate and intrastate communications on this facility because to do so would require " 'the customer to maintain two redundant facilities or to invest in expensive additional equipment' [which] would frustrate the Commission's responsibility 'to make available, so far as possible to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges' " (Pet. App. 6, quoting from Pet. App. 28).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or of another court of appeals, and does not warrant further review.

1. Petitioners and Pacific argue that, because of the reservation of state power in Sections 2(b) and 221(b) of the Communications Act of 1934, 48 Stat. 1065, 1080, as amended, 47 U.S.C. 152(b) and 221(b), the Commission may not regulate carrier facilities used for interstate communication if they are also used for intrastate communication.[5] This argument is incorrect. It has been

[4]The court pointed out that the Commission had refused to assert jurisdiction over local exchange service "that could be practically separated from inter-state services supplied through the same facilities" (Pet. App. 5).

[5]Although petitioners in No. 77-406 speak of "purely intrastate communications services" (Pet. 14), it is not disputed that the facility in question is used mainly for interstate communication (Pet. App. 21). The Commission made it clear that it has no intention of regulating facilities used exclusively for intrastate calls (Pet. App. 5-6, 33).

rejected three times by other courts of appeals, and this Court has declined to review two of those decisions. *North Carolina Utilities Commission* v. *Federal Communications Commission* (*NCUC I*), 537 F. 2d 787 (C.A. 4), certiorari denied, 429 U.S. 1027; *North Carolina Utilities Commission* v. *Federal Communications Commission* (*NCUC II*), 552 F. 2d 1036 (C.A. 4), certiorari denied, October 3, 1977 (No. 76-1675); *Puerto Rico Telephone Co.* v. *Federal Communications Commission*, 553 F. 2d 694 (C.A. 1).[6]

Review should be denied here for the reasons discussed in our brief in opposition in *NCUC II*.[7] The fact that *NCUC I* and *NCUC II* involved terminal equipment attached to the lines, while this case involves attaching an interstate line to local lines, is not material. Sections 2(b) and 221(b) refer to "facilities" without distinction, and, as the court of appeals recognized, the *NCUC* cases "succinctly articulated the principles that govern this case as well" (Pet. App. 6).

2. Petitioners also contend that the Commission should not have resolved, without an evidentiary hearing, the essentially factual question whether it was technically and practically difficult to separate the interstate and intrastate communications on this facility. This question, which involves no unsettled legal principle, does not require review here. Moreover, the Commission did not err. The Commission concluded not only that it would be technically difficult to separate interstate from intrastate messages but also that, in order to surmount this difficulty and subject intrastate communications to state regulation, customers of interstate specialized carriers

[6]Accord, *Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W. 2d 531.

[7]We have furnished copies of that brief to counsel in this case.

would be required "to maintain two redundant facilities or to invest in expensive additional equipment" (Pet. App. 28). Petitioners do not dispute the fact that at least the latter of the Commission's assessments is correct. There was, consequently, no need for an evidentiary hearing.[8] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. Cf. *Codd* v. *Velger*, 429 U.S. 624.

The Commission's conclusion that California's prohibition of interconnection would impermissibly burden interstate communications is, as the court of appeals held, reasonable (Pet. App. 6). Having properly found that California's policy is inconsistent with federal policy, the Commission resolved the federal-state conflict in favor of federal supremacy. This result is correct, for a valid federal regulatory program prevails over inconsistent state law. *Hines* v. *Davidowitz*, 312 U.S. 52; *Farmers Union* v. *WDAY*, 360 U.S. 525.

[8]Similar arguments about the need for a hearing were raised by petitioners in *NCUC I* and *NCUC II*. In those cases, too, it would have been technically feasible to separate the interstate and intrastate aspects of the service. In both cases, however, the result would have been the same: wasteful duplication of facilities and ultimate frustration of the Commission's statutory mandate. No evidentiary hearing was necessary in *NCUC I* and *NCUC II* to demonstrate this obvious fact, as none was necessary here. See *NCUC I*, *supra*, 537 F. 2d at 791-792; *NCUC II*, *supra*, 552 F. 2d at 1043.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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